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INSURANCE OF TAX TITLES

By Lawrence L. Otis*

Lawrence L. Otis

POLICIES of Title Insurance are contracts of indemnity. Unlike other types of insurance, however, the premium is not based upon loss experience and fixed to reflect the assumption that losses in a calculable ratio to insurance undertaken surely will occur. On the contrary, a large portion of the cost of title insurance is absorbed in the examination and determination of the integrity of the title *before* the risk is undertaken, to the end that—so far as humanly possible—the probability of loss will be minimized. This ideal is, of course, only approximated, never realized; for substantial losses do occur. This is readily appreciated by any attorney, who can attest to the impossibility of guaranteeing the impregnability of every contract and cause of action, however confident of his position he may be.

The attitude of courts toward tax titles has been through the years consistently adverse; and it has been incumbent upon the

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Mr. Otis is a member of the Los Angeles Bar Association, the Law Society, and the Chancery Club. He has served on various legislative committees of the Los Angeles Bar Association and of the California Land Title Association, aiding in drafting and sponsoring legislation. He has lectured at U. S. C. and U. C. L. A., as well as before other organizations, on real property law and other topics, and has contributed articles of significance to the Los Angeles Bar Bulletin. His "What Protection Is Title Insurance?" appearing in the Bulletin, December, 1946, has been widely distributed in booklet form.

purchasers of tax deeds to prove to the uttermost detail a compliance with the provisions of the tax laws. The effect of this was to make tax titles almost impossible to establish. Taxes were regarded as a necessary evil, an imposition by the government "in invitum"; and a mistake of so much as a cent in the demand became "exaction, not taxation," invalidating the entire proceeding. The purchase of a tax title was castigated by our court as simply "buying a lawsuit."

It is understandable, therefore, that title insurers have, over the years, viewed tax titles with "a jaundiced eye," and would not insure such a title until established by final decree in proceedings considered fully effective to preclude former owners from ever asserting any defect therein. So ingrained had become this attitude against tax titles that it is a matter of some amazement that title insurers recently have brought themselves to the point where they will now consider insuring them. Their conversion to this viewpoint has been no overnight affair.

LEGISLATION RESULTING FROM ECONOMIC DEPRESSION

The depression during the decade preceding the last War was primarily responsible. Before that, any contest over a tax title was almost invariably a private affair—the purchaser against the former owner—and the state was an indifferent spectator. When, however, economic adversity resulted in wholesale delinquencies, with thousands of parcels off the tax-rolls (in 1937, in Los Angeles County, over 100,000 parcels) counties and cities began to suffer under the impact of dwindling revenues, sometimes approaching bankruptcy; and faced with the necessity of realizing revenue from tax-sold lands hard-pressed taxing agencies soon realized the need of greater stability to tax titles, since selling "a lawsuit," rather than a marketable title, made a great deal of difference to them financially.* But tax proceedings, with their Pandora's box of irregularities, represented many successive steps over a period of years, and there was no hope of rectifying

*"One of the simplest and most obvious methods of reducing the burden of tax-paying property is to return to the tax rolls the tax-deeded land that is now carrying no part of the load. The heavy tax burden and the high interest and penalties on delinquent payments have encouraged an alarming amount of tax delinquency, and Los Angeles County leads the state in this respect. Approximately one hundred thousand parcels, with an assessed valuation of about twenty-two million dollars, are tax-deeded in this county. A return of all of this property to the tax rolls would result in an annual revenue of over three hundred thousand dollars to the county alone." 1941 Report—Citizens Committee on Taxation.

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FORWARDING FEES

IT HAS come to the attention of the Board of Trustees of the Los Angeles Bar Association that with increasing frequency legal matters are referred by lawyers in other states to lawyers practicing in Los Angeles County under arrangements by which the so-called "forwarding attorney" asks for and is given one-third of the fee paid by the client for the services rendered. Conversely, local lawyers have been forwarding business to other cities under similar arrangements.

There is no criticism of this practice when it is limited to instances in which the forwarder, to a degree sufficient to justify the division, shares in the services and responsibility and not solely in the fee.

In other cases this Board considers the practice to be a clear violation of the Rules of Professional Conduct of the State Bar of California and the Canons of Ethics of the American Bar Association and other bar associations.

Canon 34 of the American Bar Association Code reads:

> "No division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility."

Rule 1 of the California Rules contains the following:

> "The specification in these rules of certain conduct as unprofessional is not to be interpreted as an approval of conduct not specifically mentioned. In that connection the Canons of Ethics of the American Bar Association are commended to the members of the State Bar."

Opinion No. 153 of the American Bar Association Committee on Professional Ethics and Grievances, in which Canon 34 was applied, quotes with approval decisions of the Committee on Professional Ethics of the New York County Lawyers Association to this effect:

> "All division of compensation paid lawyers should be based upon the sharing of professional responsibility or service, and a division of fees merely because of recommendation of another is not proper."

Our investigation of a practice which has become too prevalent in this area indicates that the Rules of Conduct referred to above are violated in the following kinds of transactions:

(a) A lawyer in another city introduces a client to a correspondent here or recommends the Los Angeles lawyer to the

client. The Los Angeles lawyer performs all the services and the "forwarding attorney" does nothing.

(b) The "forwarding attorney," with the approval of the client, refers a particular matter to the Los Angeles lawyer. The Los Angeles lawyer performs all of the services without further correspondence with or aid from the "forwarding attorney."

(c) The client thereafter retains the Los Angeles lawyer for new matters in no way connected with the original employment. The "forwarding attorney" nevertheless shares in the fees paid for such later employment, even though he participates in no way in rendering services and in some cases does not even know that the matter has arisen.

In the opinion of this Board of Trustees all of these lettered practices are unethical, in violation of established and accepted rules, and should be discontinued.

This Board of Trustees has further found that in many, if not in most, instances in which fees have been divided, the fact that the division is made is not disclosed to the client. This is a violation of Canon 36 of the American Bar Association which reads:

> "A lawyer should accept no compensation, commissions, rebates or other advantages from others without the knowledge and consent of his client after full disclosure."

In order that this decision of the Board of Trustees may be made known generally to membership and to the public, it is ordered to be printed in the LOS ANGELES BAR BULLETIN.

THE WORK OF THE DELEGATION TO THE CONFERENCE OF STATE BAR DELEGATES

By Wm. P. Gray

A LITTLE over three years ago, one of the members of the Los Angeles Bar Association had a professional experience which rather forcibly convinced him that a particular section of the C. C. P. should be altered. He brought the matter to the attention of the group of lawyers that had been designated to

*William P. Gray, Chairman of State Bar Delegates, Los Angeles Bar Association, 1949, is a graduate of U. C. L. A., 1934, and he received his LL.B. from Harvard Law School, 1939, cum laude, being an editor of the Law Review. He spent 1939-40 as Legal Secretary to Mr. Justice (now the Chief) Harold M. Stephens, U. S. Court of Appeals, Washington, D. C., and thereafter was associated with Messrs. O'Melveny & Myers until called to active Army duty early in 1941. Upon his release from the Army as a Lt. Colonel in October, 1945, he opened his own office, and has practiced law in Los Angeles since.

represent this Association at the annual Conference of State Bar Delegates, which assembled in Coronado in September, 1946, and the change that he proposed has now become law. Other lawyers, who have taken comparable action, have had the satisfaction of seeing their respective legal "creations" embodied in the code supplements.

Once again, our President has appointed a delegation to attend a Conference of State Bar Delegates, this time in San Francisco. This delegation met early in May, named a vice chairman (Gordon Files) and a secretary (Gordon T. Hampton), and divided itself into committees for the purpose of studying the various proposals for further changes in the statutory law that have been currently submitted by individual members of this Association. At subsequent meetings the delegation hears the reports of its committees and by vote selects those proposals that it will submit, following approval by the trustees, as resolutions sponsored by the Los Angeles Bar Association.

THE PROCEDURE

The resolutions that this Association determines in the above-described manner to sponsor are sent immediately to the headquarters of the State Bar where they are placed on the agenda for the Conference, along with all other proposed resolutions, and are published to each individual delegate in the State.

After our own delegates have had an opportunity to absorb this material, we will meet again in August in order to consider together the merits of the resolutions proposed by others and to lay plans that will insure the adoption by the Conference of the ones that we sponsor.

The Conference of State Bar Delegates will meet during the first two days of the annual meeting of the State Bar (Aug. 29 and 30) and will vote on each of the resolutions presented to it. Adoption of one of these resolutions at this time automatically becomes a request by the Conference to the Board of Governors of the State Bar that the proposal contained in the resolution be recommended favorably to the Legislature in Sacramento.

Past experience justifies the anticipation that a large majority of the proposals sponsored this year by our Association will be approved by the Conference and that many of the matters so approved will be included in the legislative program of the State Bar.

SUCCESSOR TRUSTEESHIP

By John W. Luhring

John W. Luhring

THE adoption of the Revenue Act of 1948 has thrown the testamentary trust into new prominence. Estate planners report almost universal use of these trusts in Wills disposing of estates of consequence. This focuses attention anew on successor trusteeship. Almost every trust created unless a corporate trustee be appointed in the first instance will present the draftsman with the problems of substituting fiduciaries.

This examination has as its objective a brief résumé of three aspects of successor Trusteeship. First to be considered are the circumstances requiring and methods provided for the appointment of the successor, next are the problems of the transfer to the substituted fiduciary, and finally that worthy's powers, liabilities and duties.

STATUTORY AUTHORITY

One may follow with profit the oft-repeated injunction to turn to the Codes in beginning research. There (Civil Code Section 2260) we find that a trustee assenting to or procuring his discharge before the trust is fully executed must use ordinary care and diligence to secure the appointment of a trustworthy successor. Not much further along Civil Code Section 2289 implements the earlier section in requiring the Superior Court of the county where trust property is situated to appoint another trustee where a trust exists without any appointed trustee or where all trustees renounce, die or are discharged. It is also of interest to examine Section 2287 which simply seems to state a proposition somewhat similar to that in 2289, but the cases leave one unsure. Of the nineteen cases found in California no court has seemed certain whether the one section or the other is authority for the proposition that the court must appoint a trustee

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in the event of a vacancy. At least one of the cases with commendable impartiality cites both sections (L. Schlessinger v. J. S. Mallard, 70 Cal. 326, 333).

Sections 1125 and 1126 of the Probate Code also should be mentioned as providing for appointment of successor trustees before (1125) and after (1126) distribution of the estate in probate. The notices required are respectively published under the former and under the latter posted and mailed as required by 1200 Probate Code. The appointee under these sections must post the bond required by Probate Code Section 1127.

It is of some interest to note that securtiy is not required of a trustee appointed under the terms of the trust instrument and none is required of the trustee appointed under Civil Code Sections 2287-2289. The distinction between testamentary trustees and those appointed under the Civil Code sections last cited seems difficult to justify.

It may thus be stated that the appointment of the successor trustee (more or less the same problem in both charitable and non-charitable trusts) may be accomplished by having recourse to the court or by providing for a successor in the rtust instrument. Sometimes the latter method will merely provide for designation of the trustee by someone under authority reserved or granted.

Somewhat more intricate is the problem arising when for the time being there are less than the designated number of trustees serving. Rarely will the trust instrument require the continuance at all times of a specified number of trustees although this is a proper subject for the draftsman's attention. Absent express provision it is sometimes difficult to determine an intention of the creator as to whether or not the original number of trustees shall be maintained. (Restatement of the Law of Trusts Sec. 108, comment b.) The general principle would confer the trust's administration upon the survivor or survivors of the original trustees. Presumably, Civil Code Section 2288 in so providing is consistent with Section 2289 which confers discretion upon the court to appoint a lesser or the original number of trustees.

THE TRANSFER OF TITLE

Generally, at least in the absence of statute, appointment of a successor trustee by the courts still requires conveyance to the

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ALTERNATE PEREMPTORY CHALLENGES

By Hon. Stanley Mosk*

ATTORNEY BLACK and Attorney White had peremptorily challenged four prospective jurors each on behalf of plaintiff and defendant respectively. The jury box was filled again.

"Your Honor," said Black, "I pass the jury as presently constituted."

White then exercised his fifth challenge. The replacement juror was queried on voir dire examination.

"We accept the jury," said Black.

White used his sixth and final challenge, the excused juror was replaced, the new juror questioned briefly and passed for cause.

"Swear in the jury," His Honor ordered the court clerk.

"Just a moment, if Your Honor please," Black interrupted. "We have two more challenges and desire to exercise them at this time."

"We object," countered White. "Plaintiff had his opportunity to challenge and passed. Now that we have exhausted all of ours, he cannot use challenges he previously waived."

And thus what began as a perfunctory selection of a jury jolted His Honor out of complacency into controversy.

Before listening to argument and citations, however, His Honor's mind wandered momentarily back some twelve hours to a social evening with friends.[1] The principal diversion had been a game of skill commonly called draw poker,[2] not to be confused with the gambling game known as stud poker.[3]

An opponent had passed his first opportunity to open. Based on that indication, His Honor had waged a modest sum. By

*Judge of the Superior Court. Attended the University of Texas and the University of Chicago, receiving degrees of Ph.B. (1933) and LL.B. (1935). From 1939-42, he was executive secretary to the Governor of California, and in 1940 served as a regent of the University of California. He has been a judge of the Superior Court since 1943, and author of a number of articles in both legal and popular periodicals.

[1]This is purely hypothetical, not autobiographical.
[2]3 Attorney General's Opinions 378.
[3]Penal Code 330.

the time the wagering reached the first opponent again, however, he not only bet, but raised.

"Sandbagging!," growled His Honor. This quaint expression has been defined as "coercing by crude means."[4] As the color in his neck deepened, he thought, "This fellow is seeking an advantage to which he is not entitled." It is interesting to note that His Honor's mental sentiment was peculiarly similar to the language of the Supreme Court in *Vance v. Richardson*.[5]

That case, and its concern with peremptory challenges, brought him back to the realities of researching the subject for a ruling on defendant's objection.

The subject of peremptory challenges has been popular in law reviews throughout the country,[6] but this particular question has not enjoyed any considerable discussion. This is due, no doubt, to the fact that at common law there was no right of peremptory challenge in civil actions. The right, therefore, is purely statutory and does not exist except where expressly so conferred.[7]

Peremptory challenges have been defined as those which may be made or omitted according to the judgment, will or caprice of the party entitled thereto, without being required to assign reason therefor. Blackstone characterized it as "an arbitrary and capricious species of challenge."[8]

By statute in California, parties to a civil action are entitled to six challenges, and "they must be taken by the sides alternately, commencing with the plaintiff."[9] In interpreting that section of the code, however, the cases are not clear as to whether counsel waives his right to one or more of his six challenges by failing to exercise them alternately.

There appear to be three conflicting views expressed in the few cases available on this subject. The first line holds that a party may exercise his peremptory challenges at any time before the jury is sworn.[10] A second line maintains that the challenges

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[4]Websters' New International Dictionary. See also Foster on *Hoyle*, 163 ff.
[5]110 Cal. 414.
[6]48 Columbia Law Review 953; 14 St. John's Law Review 142; 11 Texas Law Review 373; 9 Southern Calif. Law Review 258; 11 Nebraska Law Review 426.
[7]35 C. J. 406.
[8]Blackstone's Commentaries 353.
[9]Code of Civil Procedure 601.
[10]31 Am. Jur. 641.

must be exercised alternately and that the failure to do so constitutes a waiver thereof.[11] The third line holds that the matter is discretionary with the court.[12]

The attorney general declared, in an opinion to the district attorney of Stanislaus County[13] that "there are many cases in which it is held that the State does not waive its right to subsequently exercise a peremptory challenge by temporarily passing a jury. In none of these cases[14] is it suggested that the state should be charged with the use of a peremptory challenge when it merely temporarily passes the jury."

It should be noted, however, that the Attorney General's Opinion discusses Penal Code Section 1088, which is stated somewhat differently than Section 601 of the Code of Civil Procedure. Most noteworthy in the Penal Code section is its omission of the phrase that the challenges "must be taken by the states alternately" as contained in C. C. P. 601.

In most of the cases cited in the Attorney General's Opinion, the courts suggested that the allowance of peremptory challenges after the opportunity to challenge had been passed constituted "an irregularity," but apparently not substantial enough to justify a reversal.[15] In others the court found no error in view of the fact that the defendant had not exhausted his available challenges and thus could not complain of any denial.[16]

The one civil case which appears to hold unequivocally that a party may exercise his peremptory challenges at any time and in any order is *Silcox v. Lang,* 78 Cal. 118, 123. "The fact that a party may pass the panel as satisfactory to him, at a certain stage of the examination, cannot be held to cut off his right to challenge one of the jurors so passed, at a later stage. Such changes may have been made by subsequent challenges as to render it desirable to him that the particular juror should not sit, and of this the party must be the sole judge. The right of

[11] *Vance v. Richardson, supra.*
[12] 50 C. J. S. 1079.
[13] 10 Attorney General's Opinions 79.
[14] *People v. Majors,* 65 Cal. 138; *People v. McCarty,* 48 Cal. 557; *People v. Dolan,* 96 Cal. 315; *People v. Troutman,* 187 Cal. 313; *People v. Hickman,* 204 Cal. 470.
[15] *People v. Majors, supra; People v. Rambaud,* 78 Cal. App. 685, 692.
[16] *People v. Troutman, supra; Jackson v. Superior Court,* 10 Cal. (2d) 350.

challenge may be exercised at any time before the juror is sworn."

A directly contrary view is taken by the Supreme Court in the case of *Vance v. Richardson,* 110 Cal. 414, decided seven years after the *Silcox v. Lang* decision. There the court held specifically that "the parties must challenge alternately as provided by Section 601 of the Code of Civil Procedure," and a plaintiff who desired to exercise a peremptory challenge after the adverse party had exhausted his challenges "sought an advantage to which he was not entitled."

The court's expression would be given emphasis in a situation in which one party passed his opportunity to challenge six times, while his adversary exhausted all his six challenges. Thereafter to permit the former to exercise his challenges while his opponent was compelled to remain silent would amount almost to unilateral selection of the jury.

The third point of view, that the matter is entirely discretionary with the court, is indicated in the case of *Jones v. Southern Pacific Co.,* 74 Cal. App. 10, 37. The court stated that the permission given the party to pass her challenge and later exercise it was not error, for "the ruling was within the discretion of the court. No abuse of discretion was shown." The Supreme Court reached the same result in *Vallejo R. R. Co. v. Reed Orchard Co.,* 169 Cal. 545, 559.

Aside from the specific problem involved in interpreting Section 601, there is also a conflict in general principles involved. On the one hand, authorities indicate that the right to peremptorily challenge jurors should be liberally construed and its freest exercise permitted, to enable the parties to obtain a fair, intelligent and representative jury.[17] On the other hand, it is equally clear that procedural statutes, involving practices and rights unknown to common law, must be strictly construed.[18]

It would appear that until some clarification of the alternation required by C. C. P. 601 is forthcoming, each court will exercise its own discretion.

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[17]*People v. Edwards,* 101 Cal. 543.
[18]35 C. J. 406.

Silver Memories

Compiled from the Daily Journal and Los Angeles Times of JULY, 1924.
By A. Stevens Halsted, Jr., Associate Editor.

SINCE no other individuals have filed for the offices, Chief Justice **Louis W. Meyers,** of the Supreme Court and his Associates, **John W. Shenk** and **J. E. Richards** will be nominated in the August primaries and go on the final ballot unopposed. The same situation obtains in the case of Justices **Lewis R. Works** and **Jesse W. Curtis** of the District Court of Appeal. The failure of other aspirants to take the field against them must be accepted as conclusive evidence not only of the wholehearted endorsement of the Bar of California but of the tremendous confidence reposed in them by the people as a whole.

* * *

Charles Evans Hughes, Secretary of State, has been elected President of the American Bar Association. He will head the 800 members attending the joint meeting with the English Bar Association this month in London.

* * *

There are 46 candidates for the fourteen openings on the Los Angeles County Superior Bench to be voted on in the August primaries. The places to be contested for are now held by Judges **York, Valentine, Avery, Archbald, Fleming, Keetch, Hardy, Thompson, Shaw, Clark, Collier, Guerin, Burks** and **Hollzer. W. S. Baird,** justice of the peace for Los Angeles township, has announced his candidacy, and will wage his campaign upon his record in the "speeders'

court." Former State Senator **Henry M. Willis,** former United States Commissioner **Stephen G. Long,** Police Judge **Frederickson,** and Justice of the Peace **J. Walter Hanby** are also seeking seats on the local Superior Court.

* * *

A fight is being waged in Congress whether the income tax on corporations should be increased from 12½% to 14%, or a graduated scale be substituted.

* * *

Dean **Frank M. Porter** of the College of Law, University of Southern California, has announced the awarding of the Class-A rating to the law school by the council on legal education of the American Bar Association. Other law schools in California receiving this rating are the University of California, the Hastings College of Law and Stanford University. During the last school year the U. S. C. College of Law had an enrollment of 455 students, with 122 legal students enrolled in the summer session of the college.

Editor in charge of this issue—John L. Martin.

Los Angeles' streets are the most congested of any in the United States. Approximately 310,000 automobiles daily enter the downtown congested district of Los Angeles. Motor traffic at Adams and Figueroa Streets is said to be the heaviest in the United States; during a recent check of 11½ hours, 69,797 cars passed the intersection.

* * *

The long, drawn-out Democratic National Convention has demoralized government office workers in the nation's capital. Radiocast loud speakers which have been in service constantly in every government building in Washington are responsible. The White House has set the precedent by having a radio in the executive offices. There has also been a radio in the outer office of the Secretary of State and many other government officials similarly have kept tab on the protracted sessions of the convention. This is the first broadcast of a political convention.

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"Inspiring and heroic, rather than tragic, is the spectacle of battleships being scrapped under the Disarmament Pact," Secretary of the Navy **Curtis D. Wilbur** has declared. He said officers of the Navy are inclined to view the dismantling of the men-o'war as a tragedy, but in his opinion, it marks "the beginning of a new era of world peace."

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United States District Judge **Wm. P. James** of Los Angeles has been assigned by Chief Justice Taft of the U. S. Supreme Court to hold federal court in the Southern District of New York in October.

* * *

Until the danger of fire to California's forests and fields is passed, motorists are requested to refrain from using muffler cut-outs while driving parallel to grain fields or in the mountains. A number of recent fires have been traceable to flying sparks from open mufflers. Experience has shown that an automobile will operate successfully under every condition without the use of a cut-out.

O. W. HOLMES, JR.

1841-1935

Any two philosophers can tell each other all they know in two hours.

General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise.

Continuity with the past is a necessity, not a duty.

SUCCESSOR TRUSTEESHIP

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trustee to vest title. Many states have statutes which provide for such vesting without the necessity of conveyance and California cases provide for vesting simply upon a decree appointing the new trustee. (See for example Fatjo v. Swasey, 111 Cal. 628.) There is no California statute although the Bank Act does dispense with a conveyance to a successor corporate trustee in the event of a sale, merger or consolidation under Sections 31, 31a or 31b.

Having succeeded to the office and trust estate what are the powers, liabilties and duties of the successor trustee?

POWERS OF THE SUCCESSOR

As far as the powers essential to the ordinary administration of the trust are concerned, there is little difficulty in following these into the hands of the succeeding fiduciary. Of course, the draftsman can always provide for or limit the exercise of any power by the successor and express provision is advisable, since otherwise the right to use of all powers and discretions by the successor may present a doubtful issue. Despite Fatjo v. Swasey (*supra*) and Bennett v. Ukiah Fair Association, 7 Cal. 2d 43, most authors recommend specific provision for exercise of powers and discretions by the successor trustee to the extent that it is desired to have these matters continued by the new fiduciary. Instances can readily be supposed where a settlor may wish to restrict the operation of the general rule which ordinarily would pass most powers and discretions to successor trustees.

As to liabilities attaching to the incoming fiduciary, generally it may be said that he will only be responsible for those obligations and liabilities which he causes to be created. He will not

be visited with the sins of his predecessors except in case his predecessor was a sinner and the successor ignores that fact.

Of course each trustee has the primary duty to execute the trust and to perform all of those functions which the law casts upon a trustee in the process. A successor trustee, however, has the additional duty of examining the acts of his predecessor exercising reasonable diligence in so doing and making claim against the former trustee for any impropriety. As to how far he must go in reviewing the acts of his predecessor one might answer as did Frederick O. Dicus of the Chicago Bar Association when he said, "I think I would advise him . . . that he must start in at the beginning and not give up until he has reached the end." A comprehensive test to say the least!

THE PREDECESSOR'S ACTS

Though the enumeration is not expected to be all inclusive the rule suggested would suppose first a determination that all of the trust property was properly transferred to the trustee at the creation of the trust and that the trustee thereafer: (1) retained and disposed of appropriate trust assets; (2) prudently invested the estate; (3) kept proper control of trust property and adequately recorded transactions; (4) properly received and disbursed principal and income and made proper allocations to the respective accounts; (5) reasonably exercised discretions; (6) made all proper tax returns and payments but only proper ones; (7) made only proper invasions of corpus upon appropriate occasions. In short, determination must be made whether or not the trust assets include a claim against the predecessor trustee and any such claim pursued diligently. (See The Restatement, Sections 177, 223.)

It has been suggested that the difficulty of making a proper examination of the administration of the preceding trustee is so great as to justify exculpation of the successor or at least a limitation on the extent to which the successor must go. The draftsman may so provide and this may be proper where the trustee and beneficiaries are in close relation. The professional fiduciary though unless otherwise directed in the instrument would expect applicable conventional standards to be the measure of conduct for itself and its predecessor.

THE EXECUTOR AS A PREDECESSOR

It should not be overlooked that a testamentary trustee who is not also the executor of the will must be the watchdog of the trust estate. Such trustee's duties begin with the death of the testator and it is believed that a request for special notices should be filed and reasonable scrutiny brought to bear on teh acts of the executor during the administration. Here is an example of the predecessor working before the very eyes of the successor and it is supposed that he standards of care applicable to the successor trustee in examining the acts of the executor would be a high one.

It is customary for the draftsman to give the trustee a right to resign as the trustee, except—a testamentary trustee, will not ordinarily have this right. (See The Restatement, Sections 106, 107. See also Civil Code Sections 2282, 2283 and Probate Code Section 1125.1.) It is well also for the instrument to provide a method by which the resignation of the trustee can be effected, to provide for appointment of a successor or successors to the office and to set out means for delivery of the trust estate to the new fiduciary. Provision should also be made for passing powers and discretions to the successor trustee to the extent desired.

A successor trustee in examining the acts of his predecessor will have need of the advice of counsel in giving such examination proper guidance and in making certain that all of the acts of the predecessor which require attention are given as much as they deserve.

Trusteeship is always a burden and as Mr. Justice Cordozo once said in Meinhard v. Salmon, 249 N. Y. 458: "Many forms of conduct permissible in a workaday world for those acting at

arm's length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honestry alone but the punctilio of an honor the most sensitive is then the standard of behavior." It becomes apparent that the labors of a successor trustee will be more arduous at the outset at least than those of his predecessor.

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the defects by doing the work over; hope remained only to contrive some expedient to validate the work already done. The aid of the legislature was sought; and there were enacted, in the years 1939-1945, three general types of remedial legislation: Curative Acts; Conclusive Presumptions; and Short Statutes of Limitation.

The help of the courts was then enlisted to establish the efficacy of these expedients; and, with the aid of astute counsel, shifting emphasis from the property rights of the private taxpayer to the fiscal emergency confronting public taxing bodies dependent upon the revenues, succeeded in investing tax titles with a new mantle of respectability. Not that such titles were lifted, *instanter*, to the dignity of a crown grant, but sufficient validity was accorded this erstwhile *"nullius filius"* in the world of titles to cause title men to take another appraising glance. What follows is a sketch of this "new look," and how it has ameliorated, to a degree, the skepticism of the title fraternity.

CURATIVE ACT VALIDATING PROCEDURAL DEFECTS

Of the three types of legislation designed to support defective tax proceedings, the first to receive authoritative sanction was the *Curative Act* of 1943 (Stats. 1943:1993) construed by the Supreme Court of California in *Miller v. McKenna,* 23 Cal. (2d) 774, 147 P. (2d) 531 (see, also, *Compton v. Boland,* 26 Cal. (2d) 310, 158 P. (2d) 397; *Hall v. Chamberlin,* 31 Cal. (2d) 673, 192 P. (2d) 759; *Wall v. M. & R. Sheep Co.,* 33 A. C. 747.) That act provided, in substance, that every act and proceeding taken by county officials in fixing the budget or tax rate, in assessing or equalizing the assessment of property, or in the resultant levy of taxes, tax sales and tax deeds were thereby confirmed, validated and declared legally effective, *so*

*THE EXECUTOR**

By Edgar A. Guest

I HAD *a friend who died and he*
On earth so loved and trusted me
That ere he quit this worldly shore
He made me his executor.

He tasked me through my natural life
To guard the interests of his wife;
To see that everything was done
Both for his daughter and his son.

I have his money to invest
And though I try my level best
To do that wisely, I'm advised,
My judgment oft is criticized.

His widow, once so calm and meek
Comes, hot with rage, three times a week
And rails at me, because I must
To keep my oath, appear unjust.

His children hate the sight of me,
Although their friend I've tried to be
And every relative declares
I interfere with his affairs.

Now when I die I'll never ask
A friend to carry such a task
I'll spare him all such anguish sore
And leave a hired executor.

*

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far as could be done under constitutional limitations, thereby correcting defects, irregularities and ministerial errors which the Legislature could have omitted from statutory requirements under which such acts were taken; and the Court held the Act valid, applicable to prior proceedings, and effective to cure all but jurisdictional defects therein, saying: "The fact that the proceeding was fatally defective is not alone an insurmountable obstacle to the exercise of the curative power; for, if it was not fatally defective it would stand in no need of the healing power. But there are certain limitations on the exercise of that power. Included therein are the inhibitions of the Federal and State Constitution. . . . But the legislature cannot cure defects which are sometimes termed jurisdictional. Among the jurisdictional requisites are (a) a duly constituted taxing authority; (b) property to be taxed within the territorial jurisdiction of the taxing body; (c) property or subject matter legally subject to the tax; and (d) sufficient notice and opportunity for hearing to constitute compliance with due process. (Cases cited.) While the legislature cannot cure the omission of jurisdictional requisites, the manner of procedure, after jurisdiction is acquired and the mandates of due process are complied with, are matters within the legislative discretion and may be subjected to the exercise of the healing power so long as further constitutional inhibitions are observed."

The Court, however, injected (perhaps over-broadly—see dissenting opinion) a further qualification, *i.e.,* inability of the Legislature to impair vested rights intervening the act done and the statute passed curing it, holding that "the Legislature has no power to take the property of one person and give it to another"; stating further that "The question of what constitutes such a right is confided to the courts."

It will be seen, therefore, that, while reliance may be placed upon such curative acts as validating procedural defects, they do not reach serious or jurisdictional defects (absence of due process), and cannot impair intervening vested rights. Consequently, they clearly afford insufficient protection to an insurer relying on them as a barrier to successful attack.

CONCLUSIVE PRESUMPTIONS APPLICABLE TO DEFECTS

Conclusive Presumptions, the second type of validating act, has about the same efficacy as curative acts. As an example,

the Revenue and Taxation Code provides that, except as against actual fraud, the (tax) deed is conclusive evidence of the regularity of all proceedings culminating in such deed (Sec. 3711); and the Supreme Court has said: "It may be regarded as settled that the legislature may make a tax deed conclusive evidence of a compliance with all provisions of the statute which are merely directory of the mode in which the power of taxation may be exercised, but that it cannot make it conclusive evidence of those matters which are essential to the exercise of the power; that as to those steps which are jurisdictional in their nature, and without which the power of taxation cannot be called into exercise—such as listing or assessment of the property, a levy of the tax, some notice of its delinquency, and that the property will be sold therefor—the legislature cannot deprive the owner of the right to show want of compliance." (*Ramish v. Hartwell*, 126 Cal. 443, 58 Pac. 920.)

In *Chase v. Trout*, 146 Cal. 350, 80 Pac. 81, strongly relied upon in the McKenna case, the court said that *the legislature cannot deprive the owner of the right to show want of compliance with the basic requirements of due process of law.* And, in *People v. Van Nuys Lighting Dist.*, 173 Cal. 792, 162 Pac. 97, it was held that defects which go to jurisdiction and make the action taken void cannot be cured by a curative act or conclusive evidence clause.

VALIDATION BY STATUTES OF LIMITATION

The third expedient devised to bolster defective tax titles, and the one which bids fair to excel the others in its efficacy, is the provision that any attack upon the tax title is barred unless brought within a limited period after the issuance of the deed. In the State of Washington, title insurers have, in general, relied with reasonable safety upon a statute of limitations requiring actions to set aside or cancel the deed or for recovery of the lands sold for delinquent taxes to be brought within three years after the date of issuance of the deed, and on the uncompromising decisions of the Supreme Court of Washington giving this statute sweep even against void proceedings.

It is the same in the State of New York, where a similar statute has been given like effect, *Meigs v. Roberts*, 56 N. E. 838, holding that constitutional limitations upon the scope of

curative acts do *not* apply to a statute of limitations, for such a statute will bar any right, however high in its source, provided a reasonable time is given a party to enforce his right. And the United States Supreme Court has held that this result contravenes no provision of the Federal Constitution. (*Saranac v. Roberts,* 44 L. Ed. 786.)

There are three such statutes in this state: Sections 175, 3521, and 3725, Revenue and Taxation Code. The first, enacted in 1945, after an unsuccessful attempt to have it adopted as a constitutional amendment, states that all tax deeds *to* the state or to any taxing agency are conclusively presumed to be valid unless attacked within one year after the execution of the deed. Section 3521, which became operative June 1, 1941, provides that "A proceeding based on an alleged invalidity or irregularity of any deed to the State for taxes or of any proceedings leading up to the deed can only be commenced within one year after the date of recording of the deed to the State in the county recorder's office or within one year after June 1, 1941, whichever is later." Section 3725, enacted in 1939, reads: "A proceeding based on alleged invalidity or irregularity of any proceedings instituted under this chapter (sale by the state) can only be commenced within one year after the date of execution of the tax-collector's deed."

Section 175, while couched in the terms of a conclusive presumption, nevertheless differs from the conclusive presumption statutes mentioned earlier, in that the presumption does not arise immediately, but only after one year without attack, and is, therefore, susceptible of three constructions: Either it is a mere "conclusive presumption" or curative act, a short statute of limitations, or a short statute of adverse possession. As it has not yet been authoritatively construed, it will not be further mentioned here in view of the decisions respecting Section 3521, now to be considered.

Two cases turning upon Section 3521 reached our appellate courts in 1947: *Tannhauser v. Adams,* 31 Cal. (2d) 169, 187 P. (2d) 716, and *Davault v. Essig,* 80 Cal. App. (2d) 970, 183 P. (2d) 39 (hearing in Sup. Ct. denied; certiorari denied by U. S. Sup. Ct. 3-8-48). Since these cases go much farther toward validating all defects, however basic, in tax sale proceedings, and constitute the principal reliance of title companies in

insuring tax titles, they require close analysis. The *Tannhauser* case involved an attack upon a tax title by the former owner *out of possession* against the tax purchaser *in possession*, instituted more than one year after the deed *to* the state (indeed, more than one year after the deed by the state—compare Sec. 3725), relying upon what was conceded to be a basic or jurisdictional defect, failure to mail to the plaintiff, as then owner of the property, notice of the impending sale of the property to a purchaser or to the State, as required by law. Defendant pleaded the bar of the one-year statute (Sec. 3521) and this plea was upheld. The court reviewed decisions from other states, some holding such a statute inapplicable to jurisdictional defects; others giving them broad sweep; and concluded that there was no sound reason why the right of one *out of possession* to attack a tax title for such defect should not be barred if his action is not instituted within the prescribed statutory period, provided that such statutory period is a reasonable one, saying that, while statutes of limitation are designed to affect the remedy, and not the right or contract, it has been the settled rule ever since *Arrington v. Liscom*, 34 Cal. 365, that the possession of property of the requisite character and time confers a title to the property; and, so far as the title to real property is concerned—prescription and limitation are convertible terms, and a plea of the proper statute of limitation is a good plea of a prescriptive right.

Davault v. Essig also was an action by the former owner, attacking a tax title based upon proceedings culminating in deeds to the state over nine years before and instituted over three years after the latest date for the commencement of the one-year period prescribed by said Section 3521. The plaintiff contended that the section was inapplicable because the various alleged defects in the tax proceedings leading up to the deed to the State were jurisdictional or constitutional, so that such proceedings were entirely invalid; but the court held the contention without merit "since Section 3521 is not a curative act, but is a statute of limitation and repose, providing a reasonable period of limitation . . . If the shortening of the period of redemption, where a reasonable time is allowed in which to act, is not violative of constitutional rights (*Mercury Herald Co. v. Moore*, 22 Cal. (2d) 269), it would seem to be even more clear,

under principles which are frequently applied, that a right exists to fix some reasonable limitation upon the time within which a constitutional right may be exercised, by which a limitation is placed upon the time within which an action may be commenced to attack the validity of a deed to the State, which deed is given after the five-year period of absolute right of redemption has expired." The court then quoted from a New York case: "Such a statute will bar any right, however high the source from which it may be deduced, provided that a reasonable time is given a party to enforce his right."

QUESTIONS ARISING UNDER RECENT DECISIONS

It will be observed of the latter that the element of possession was not mentioned; the decision is unqualified. While the Supreme Court reviewed the decision of the District Court of Appeal in the *Tannhauser* case, it did not see fit to review its decision here; yet in the *Tannhauser* case the Supreme Court was careful to confine its holding within the narrow limits of adverse possession. In spite of the great deference due the deci-

sions of our District Courts of Appeal, after a hearing thereon has been denied by our Supreme Court, particularly where the United States Supreme Court has denied certiorari, there is always a lingering doubt as to the finality of such decisions as precedents until the principles established thereby have been squarely affirmed by the Supreme Court.

A further qualification, emphasized in the *Tannhauser* case, must be noted. It was there stressed that "it is questionable whether, as to an owner *in actual possession of land,* the record of a hostile conveyance in the clerk's office is sufficient to set a statute of limitations running against him so as to destroy his title. . . . So long as the original owner of land which has been sold for taxes *remains in undisturbed possession* of it, the statute of limitations does not run against him or prevent the maintenance of a suit to set aside the tax sale or remove the cloud on his title."

Again, in the *McKenna* case, it was asserted that there must always be (a) a duly constituted taxing authority; (b) property to be taxed within the territorial jurisdiction of the taxing body; (c) property or subject matter legally subject to the tax;

and (d) sufficient notice and opportunity for hearing to constitute compliance with due process. It is felt that only the last mentioned requirement is within the scope of such statutes of limitation. Care must therefore be taken, in all cases, to determine the legality of the taxing-agency, the location of the property within its territorial jurisdiction, and that such property was not exempt, or taxed twice, or the taxes paid, or the sale redeemed.

STATUTES OF LIMITATION MAY BE TOLLED

Moreover, it is obvious from what has been here summarized, that greatest reliance, in support of tax titles, must be placed upon the statutes of limitation precluding attack after one year; and, in this connection, it must always be borne in mind that certain disabilities *toll* statutes of limitation; absence, death, minority, incompetency, imprisonment, bankruptcy, and military service.

One of the greatest objections attorneys have to the traditional requirement of a decree quieting a tax title is the fact that, in so many cases, the former owners have moved away and cannot be found; indeed, after the interval between the first delinquency (say 1927-1933) and the deed to the plaintiff tax-purchaser (say 1945-1948), all trace of such former owner—and of others claiming interests or liens on the property—may be gone. Service must be had by publication, after a showing of diligence and, after the decree is entered, the plaintiff must wait a year, lest rights be asserted under C. C. P. 473a. Even then, if the defendant be dead at date of the decree, it is of no effect. And, besides, the foregoing statutes of limitation are of no avail in such actions since they cannot be pleaded against the assertion *defensively* of the defects inherent in tax procedures (*Stiles v. Bodkin,* 43 Cal. App. (2d) 839, 111 P. (2d) 675; 78 A. L. R. 1074). Here, then, is the crux of the situation. Because of wholesale delinquencies during the depression, there are a great many tax titles outstanding which have not been perfected by traditional procedures. Such procedures are burdensome, time consuming, expensive, and often of doubtful force. They deprive the tax purchaser of the benefits accorded by the taxing statutes, particularly the statutes of limitation. A large proportion of the properties are of modest value. Most of them are

vacant, neither purchaser nor former owner ever having exercised any rights of possession. And taxing agencies can derive more revenue from the sale of properties that can be insured than they can if such titles must be established by subsequent litigation. These are the considerations which have induced title insurers to devise a method of insuring tax titles wherever possible, taking such precautions as will minimize the dangers of loss inherent in a situation that has not yet been fully explored by the courts.

POSSESSION AS BASIS FOR INSURING TITLES

In the first place, insurers have considered it reasonably safe to insure purchasers who, upon receipt of their tax deeds, have gone into the actual and exclusive possession of the property and have maintained such possession—and paid all current taxes—for the one-year period. Ordinarily, no extra charge is made, in such cases, where such possession is verified and the records do not disclose the possibility of disabilities which might toll the statute. A modest extra premium may be charged if reliance for proof of possession is based upon affidavit, or some other unusual element in the title suggests an extra hazard. This practice has been followed, now, for over a year.

INSURANCE OF TITLES ABSENT POSSESSION

In all other cases, the determination to insure tax titles—*upon examination of the entire proceedings from the earliest assessment for taxes not paid through to the deed to the purchaser*—is a very recent decision, announced early in April, and since placed in operation. It is based upon the conclusion that the same reliance cannot be placed upon *Davault v. Essig* (absence of actual possession) as upon *Tannhauser v. Adams* (supporting adverse possession). In any case, it must first be ascertained that the property was subject to taxation, that it was duly assessed by a sufficient description, that the taxes were not paid or redeemed, and that the tax sale and tax deed were made in due course. But, in the absence of adverse possession, that is, in the case of typical vacant property, it is felt that there remains considerable doubt of the unassailability of such title if jurisdictional defects exist—and examinations recently made disclose that, on occasion, basic irregularities are found which might ultimately be held to amount to a denial of due process. Then, too, disabilities may be present which would toll the statute.

Accordingly, and as an alternative to the former unsatisfactory requirement of a final decree quieting title, insurers have undertaken, for a comparatively modest extra charge, representing both the cost of such examination and the extra hazard assumed, to make a complete examination of the proceedings culminating in the tax deed; and, unless serious defects are encountered, to insure the tax title, after one year from the execution of the tax deed, without any proceedings being required to perfect it, provided, of course, the former owner is not in possession and has not asserted any claim of irregularity against the purchaser; provided, also, current taxes have been paid; and provided, further, there are no special circumstances indicating exceptional risk—such as legal disability, oil possibilities, valuable improvements in existence or contemplated, or other unusual problems. It must be remembered that, at present, the law does not provide reimbursement to tax purchasers, when their tax titles are upset, for the value of improvements added by them to the property so purchased. (Rev. and Tax. Code, Sec. 3728; *Numitor Gold Min. Co. v. Katzer,* 83 Cal. App. 161. It must

be stated, also that, because of the special requirements of the Torrens Act (Deering's General Laws No. 8589, Secs. 77 to 82), a judicial proceeding to establish a tax title is mandatory as to property registered under that Act.

DETAILED EXAMINATION MADE OF PROCEEDINGS

The examination of each proceeding is detailed and exhaustive. A four-page report is required, checking every step, from the assessment of the property for the first year of delinquency, through equalization of the assessment roll, notice of time and place of sale, publication of the year-end delinquent list, the sale to the state (rubber-stamp sale or "bookkeeping entry"), publication and mailing of the notice of sale, five years later (the so-called "addenda" list), the sale to the state (unless sold to a private purchaser—such sales not being permitted since 1942), which actually passes title, terminates the *right* of redemption, and leaves only a *privilege* of redemption until resold, and to and including the statutory requirements pursuant to which property so conveyed to the state subsequently is resold to the public (Secs. 3691-3730), or to another taxing agency for resale to the public (Secs. 3771-3814). In the latter case, a similar report must cover the proceedings by which such taxing agency (*e.g.*, a municipality) resells the title so acquired—and any independent title it may have, as, for instance, a tax title acquired in the collection by it of its own taxes or assessments, the proceedings leading up to which must then also be examined.

Following such examination and report, the search of title, this tax report, the affidavit of the applicant for insurance as to character of property, improvements, if any, absence of possessory rights or claims by former owner, absence of disabilities, etc., and all other available data (assessed value, unusual circumstances, etc.), are submitted to the title committee of the insurer, which then determines, in every instance, the insurability of the title and the extra charge to be made. Where the applicant submits several parcels for insurance at the same time, some reduction of the extra charge is made, depending upon the circumstances. For instance, if the several parcels are lots in the same tract, found on the same assessment roll, and sold for tax delinquencies in the same year, the examinations and reports of the proceedings leading up to the respective tax deeds there-

on can be combined or made together, thereby effecting a saving which can be passed on to the customer.

PARITY RULE NOT ELIMINATED

Because of the parity rule laid down in *Monheit v. Signa*, 28 Cal. (2d) 19, titles so insured must be shown subject to outstanding special assessments and improvement bonds, treasurer's certificates of sale thereon, or treasurer's deeds thereunder as well as the rights of purchasers at sale on court foreclosure of such assessments and bonds. The recent decision in *Rombotis v. Fink*, 89 A. C. A. 425, 201 P. (2d) 588, indicates that the lien

of special assessments and improvement bonds, unless theretofore enforced, terminates upon expiration of the periods within which they may be enforced (C. C. 2911, C. C. P. 329), and careful consideration is being given this decision; but title insurers have not yet been able to determine the circumstances, if any, under which they may give effect thereto.

ALTERNATIVE WHEN TITLE NOT INSURABLE

When it develops that, because of serious defects or unusual circumstances, the title committee is unwilling to approve insurance of the tax title in a given case, the recommendation is made that the tax purchaser establish his title, if possible, by proceedings prosecuted pursuant to the provisions of the Revenue and Taxation Code, Sections 3950 to 3972 (called a "Chapter Ten" action), for the reason that this procedure is designed especially for such cases, and permits publication of summons for a shorter period, joinder of persons unknown, joinder of the heirs and devisees of a deceased owner by that designation without requiring appointment of a representative of the estate, and also affords a possible basis (Secs. 3954, 3955) for eliminating outlawed special assessment bonds (see *Rombotis v. Fink, supra*) which otherwise would stand on a parity with the tax title. Where plaintiff cannot ascertain whether a defendant is alive, it is suggested that plaintiff sue him by name and also the "heirs and devisees of (naming him)."

CONCLUSION

The necessity that any man should lose his land for non-payment of taxes is regrettable, and this has long led courts to adopt a hyper-technical approach to the review of the proceedings by which such deprivation of property has been accomplished. Our tax laws, however, now afford landowners fair notice, a liberal period of redemption, and adequate opportunity to contest irregularities. When land becomes tax delinquent, its share of the tax burden either is shifted to the property of those who keep their taxes paid or else the government is denied a substantial portion of needed revenue. Meanwhile tax-deeded land is removed from the channels of commerce. When the reason ceases, the rule should also cease. Legislatures and courts are to be commended for their present more realistic attitude toward tax titles.